United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2014

To be argued by
MARGERY EVANS REIFLER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel.
JOHN McLEAN,

Petitioner-Appellant,

-against-

JEROME PATTERSON, Superintendent,
Eastern Correctional Facility,

Respondent-Appellee.

----------X

[APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK]

BRIEF FOR RESPONDENT-APPELLEE

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-against-

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[ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK]

BRIEF FOR RESPONDENT-APPELLEE

Questions Presented

1. Did the police have probable cause to arrest petitioner when an informer's statement had been corroborated by independent information and observation?

2. Did the admission of evidence concerning a prior conviction violate petitioner's right to a fair trial when the jury received corrective instructions and the evidence against petitioner was overwhelming?

Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Constantino, J.), dated December 20, 1974, which denied petitioner's application for a writ of habeas corpus. The District Court granted petitioner a certificate of probable cause to appeal.

Petitioner claimed that 1) since there was no probable cause for his arrest, his confession and evidence seized during a search incident to arrest should have been suppressed and 2) the admission at trial of evidence concerning a prior conviction violated his right to a fair trial. These claims were rejected by the District Court and are both before this Court on appeal.

Facts

Petitioner is presently confined in Eastern Correctional Facility, Napanoch, New York, pursuant to a judgment of conviction for the crime of robbery in the second degree, rendered by the County Court, Nassau County, after a trial by jury. On May 11, 1973 petitioner was sentenced to a three and

one third to ten year indeterminate term of imprisonment (Wilkes, J.).

The judgment of conviction was unanimously affirmed by the Appellate Division. People v. McLean, 44 A D 2d 572, 353 N Y S 2d 226 (2d Dept. 1974). The New York Court of Appeals denied leave to appeal on April 19, 1974 (Breitel, J.).

Petitioner's claim that his confession and evidence seized during a search should have been suppressed was presented to the state court in a pretrial motion. An omnibus pretrial hearing was conducted by the trial court in March, 1973. The court made extensive findings of fact and denied the motion to suppress. The findings of the trial court are uncontested (Petitioner's Brief at 5) and are set forth below (post at 6-17). In addition, the following facts concerning the informer, James Woods, were brought to the attention of the District Court and are also uncontested:

1) He was never arrested or charged in connection with the crime or any related crime;

2) No investigation concerning his involvement in this crime was undertaken;

3) Police action with respect to him was limited to the leaving of a

message at his residence that the police wished to see him and questioning of him when he volunarily appeared at the precinct;

4) He was not a suspect in this crime.

The facts concerning the introduction at trial of evidence of petitioner's prior conviction are also uncontested. The relevant portions of the trial transcript (314-20, 337, 344-46, 348-50) appear as Exhibit "A", attached to this brief.

Petitioner introduced "the 85a", apparently a police form, as an exhibit at trial. (314, 318). During the redirect examination of one of the State's witnesses, a portion of the form stating that petitioner admitted an arrest for robbery and assault in 1968 and spent four years at Green Haven was read to the jury (314, 319-20).* Petitioner's objection to the testimony was overruled (317). The Court instructed the jury that a prior arrest is no proof that petitioner was guilty of the crime for which he was being tried (320).

After a recess was called, petitioner's counsel moved to redact the statement from the 85a nunc pro tunc (337).

* Form 85a had been carefully examined and redacted at the omnibus hearing. No request was made to redact this portion at that time or when it was admitted into evidence at trial (318.)

The judge granted the request and stated that he would exert "every effort" to repair any damage done and to prevent further harm (345). The jury was recalled and the judge informed them that the statement was stricken and that it was no proof of guilt of the instant crime (349). The judge stated in part:

> "THE COURT:...I ask you now, and do more than ask, I direct you to strike from your minds for all and any purposes any reference to what was read to you this morning as I permitted Mr. Peck to do and it is no longer to be considered as a part of the evidence by you in any shape, manner or form...it has been striken and I direct you again to disregard the reference made to it in its entirety and bear in mind my admonition to you, which I repeat once again, that any reference to a previous arrest is no proof that the defendant is guilty of the crime for which he is being charged and you will disregard that reference in its entirety in every way. Is that clear to everyone?
>
> JURORS: Yes.
>
> THE COURT: Do you all agree to abide by that instruction?
>
> JURORS: Yes." (349-50).

FINDINGS OF FACT AFTER OMNIBUS HEARING

On the evening of November 11, 1972 at approximately 6:00 p.m., Constance Abrams, the complainant, was walking along Gilcrest Road in the vicinity of Schenck Avenue, Great Neck, N.Y. Mrs. Abrams heard footsteps, turned around and was attacked. Her assailant struck her several times and knocked her to the ground. She threw her pocketbook at him but he hit her again and again, whereupon she got up and started to run and scream. Her attacker then grabbed her by the hair, pulled her into an alley adjacent to an apartment house and said "Now I've got to kill you". At that point a woman opened a window and shouted "What are you doing to her?", whereupon the assailant fled. This entire incident lasted approximately five minutes.

Patrolman Arthur Swoboda who was on motor patrol responded to the scene. He obtained an oral statement of the sequence of events from Mrs. Abrams and a brief physical description of her attacker. The assailant was described as a male Negro, about 6' 1" or 6' 2" tall, short hair, clean shaven and light complexioned. Visibility was limited because of the lateness of the hour, but Mrs. Abrams felt that she could identify her assailant.

Patrolman Swoboda spoke to Mrs. Abrams a second time at about 7:00 p.m. that same day at the North Shore Hospital where she had been taken in order to determine the nature and extent of her injuries. Mrs. Abrams then repeated the same information she had provided earlier.

On November 12, 1973 Mrs. Abrams met with Detective Arthur Meininger and Detective Reuben Gomez of the 6th Precinct. She recited in detail her activities leading up to the attack and all that followed. She also informed the detectives of the contents of her handbag, namely: wallet, checks, charge account cards and cosmetics. Mrs. Abrams described her assailant as a large Negro man, clean shaven, long sideburns, close-cropped hair, approximately 6' 2" tall, wearing a 3/4 length jacket.

On November 13, 1973 at her apartment, Detective Meininger asked Mrs. Abrams if she could identify her assailant and she responded in the affirmative. Shen then accompanied him to the 6th Precinct. She was shown between twenty and thirty photographs from which she selected one (Defendant's "A" in evidence) as being a person who resembled but wasn't her assailant. Detective Meininger also drove her around the general area of the incident in order to see if she could spot her assailant, to no avail.

In court Mrs. Abrams positively identified the defendant as her assailant. The first time she actually saw the defendant after the attack upon her was at the defendant's felony examination when she also positively identified him. It emerged during the hearing that the defendant had been only inches away from her during the attack and that he had struck her several times, perhaps as many as ten times.

On November 16, 1972 Detective Daniel Sonensen was on the 9:00 a.m. to 5:00 p.m. tour at the 6th Precinct of the Nassau County Police Department with Detective Gomez. Detective Sonensen was informed that there had been a robbery of Constance Abrams which occurred at Schenck Avenue and Gilcrest Road, Great Neck, N.Y. at approximately 6:00 p.m. on November 11, 1972. Detective Sonensen was aware that: (a) the perpetrator had been described as about 6' tall, medium length hair, well dressed, clean shaven, neat; (b) the complainant had been dragged into an alley and beaten; and (c) the proceeds of the robbery included cash, credit cards and checks.

On November 16, 1972 Detective Gomez interviewed one, Jimmy Woods relative to this robbery. The interview started

before lunch and was completed in the early afternoon. The substance of that interview appears in the signed statement of James Woods. (Defendant's "B" in evidence) During the early afternoon, Detective Gomez advised Detective Meininger, Detective Sonensen and Detective Robert Steinmann of this information. Detective Gomez communicated to Detective Sonensen the following information which he had obtained from James Woods, namely that the defendant had come into James Woods' room with some checks and credit cards with the name Abrams on them, and asked Woods if he could do anything with them. Mr. Woods took some checks from the defendant.

Detective Gomez communicated to Detective Sonensen a description of the defendant provided by James Woods, who said that the defendant was a medium skinned Negro, neatly dressed, wearing green patent leather shoes with wedge heels, leather jacket and wide collar shirt, and that he (the defendant) could be found in a laundromat opposite the Great Neck Long Island Railroad Station.

Detective Sonensen spoke to James Woods himself and was given the same description, and was further advised by

James Woods that he did not know if the defendant was armed; that he might carry a knife; but that McLean would not go easily; that he was tough.

On November 16, 1972 at approximately 12:30 p.m., Detective Sonensen accompanied by Detective Steinmann and Detective Russell Burton proceeded to the laundromat in order to try to apprehend the suspect. When they arrived, no one fitting that description was there. They staked out the location and one-half hour later, at approximately 1:00 p.m., someone perfectly matching the description provided by James Woods came along, with one hand in his pocket and the other holding a brown paper bag. As the suspect approached the laundromat, Detective Sonensen called out "John McLean" which the defendant acknowledged. Detective Sonensen then advised the defendant that they were investigating a robbery and asked him to accompany them to the 6th Precinct Station House.

Detective Sonensen advised the defendant of his "Miranda" warnings and asked if McLean understood these "Rights". The defendant nodded affirmatively and said "Yes", he understood, "but you have the wrong guy".

The defendant and the officers crossed the street to the squad car. Before entering the car, Detective Sonensen asked the defendant to stand aside and gave him a pat-down search. Detective Sonensen stepped behind the defendant and worked down from the shoulders. When Detective Sonensen frisked the defendant's right-hand coat pocket he felt a bulge, reached inside and came out with assorted papers and a checkbook bearing the surname, Abrams. The detective had believed the bulge to be a knife.

The three detectives and the defendant then entered the police vehicle and drove to the 6th Precinct Station House. There was no conversation enroute. They arrived at the Station House at approximately 1:15 p.m. The defendant was logged in at the desk and then taken to a squad room in the basement where the defendant was placed in the first interrogation room.

Detective Sonensen informed the defendant of the details of the alleged robbery and then with Detective Harvey Goldberg present he advised the defendant of his "Rights", reading from a printed card.

The defendant nodded affirmatively and said "Yes, I understand". The defendant looked at the card which had been handed to him and in susbtance said that he understood what had been read to him; that he didn't want an attorney that he had no knowledge of this matter; that they had the wrong guy.

Detective Sonensen then rose from his seat at his desk and told the defendant that this was a serious crime - that the victim could identify the perpetrator - that the defendant would be placed in a line-up for the purpose of a possible identification and that he was going to call the complainant then and there. The defendant responded to this by requesting the detective, in substance, to wait a minute. The defendant asked the detective if he could help him - that he had just gotten out of jail and he didn't do any forgery - that he cannot read or write. Detective Sonensen told the defendant that he didn't know if he could do anything for him but that the defendant should tell the truth.

Detective Sonensen again reviewed with the defendant his constitutional rights. The defendant indicated he understood what the detective said and that he didn't want an attorney.

Detective Sonensen then asked the defendant to tell him what had happened. The defendant replied that he saw a white woman walking; that he grabbed her pocketbook and knocked her down; that she tried to get up and he knocked her down again; that he kept punching her; that she tried to get into an alley; that she kept screaming and he continued to punch her; that

After that, Detective Sonensen, in the presence of Detective Goldberg and the defendant, proceeded to take a typewritten statement from the defendant. Detective Sonensen typed the heading and the first two paragraphs and removed the paper from the machine. The detective then read these two paragraphs which contained the "Miranda" warnings and "waiver" to the defendant. Detective Sonensen then asked the defendant to mark an "X" after the second paragraph to signify his understanding, whereupon the defendant indicated that he could sign his name and did so.

Detective Sonensen then put the original and the copies back into the typewriter and typed the body of the defendant's statement. Detective Sonensen proceeded to ask

the defendant to repeat his story sentence by sentence. Detective Sonensen typed each statement and read it back to the defendant sentence by sentence. The defendant then signed his name at the bottom, and Detectives Sonensen and Goldberg signed their names as witnesses. The statement (People's Exhibit #2 in evidence) was completed and signed at approximately 2:00 p.m., November 16, 1972.

Detective Sonensen made no threats or promises to the defendant. The defendant did not ask for medical attention. The defendant appeared normal and had not been drinking. When the defendant asked for food and drink, he was given and he ate the chicken and coke which were in the paper bag that had been taken from him at the time of his arrest.

After the taking of the defendant's statement, he was booked, fingerprinted and processed. During the proceeding, the defendant was asked if he possessed any other items which had been taken in the robbery. The defendant replied that he had a wallet which contained a driver's license and other items in his room.

A consent search form (People's Exhibit #3 in evidence) was read and explained to the defendant. Typed on that form was the phase "defendant doesn't read or write". The defendant signed the consent form authorizing a search of his room and a seizure of the proceeds of the robbery.

The defendant then accompanied Detectives Sonensen and Goldberg by police vehicle to the defendant's room. They arrived three at approximately 3:00 p.m. and entered the premises via a basement hallway. The defendant unlocked the padlock on the door and they entered his room. The defendant had advised the Detectives that the wallet was in the closet under some clothes on the shelf, as a result of which Detective Sonensen went to the closet, placed his hand under the clothes on the shelf and removed the wallet. (People's Exhibit #4 in evidence, including contents) The two detectives and the defendant were in the defendant's room for approximately five minutes, and the defendant's brother and James Woods came into the room while they were there. The detectives then returned to the 6th Precinct with the defendant.

The court finds that there was no unlawful pre-trial show-up. The court further finds that the defendant's photograph was not selected by the complainant nor was there an impermissibly suggestive photographic identification. In conclusion, testimony of an in-court identification is admissible upon the trial of this indictment. (United States v. Wade, 388 U.S. 218)

The court finds that the defendant was properly advised of his "constitutional rights". Adequate steps were taken to insure his understanding in view of his self-calimed inability to read and write. The defendant was capable to waiving and did knowingly, intelligently and understandingly waive his "constitutional rights". (People v. Huntley, 15 N Y 2d 72) No force, threats, pressure or improper persuasion were employed in order to induce the defendant's statement. The court therefore concludes that the defendant's alleged signed statement and the testimony of the events incident thereto are admissible upon the trial of this indictment.

Detective Sonensen had probable cause to arrest the defendant. The statement made by the informant, James Woods, was against his penal interest and was substantially consistent with the information received from the complainant. James Woods

accurately described the defendant, his attire and his probable location. The sum total of the information known by Detective Sonensen was justified in searching the defendant upon his arrest. The defendant was believed to have committed a violent crime. The informant had stated that the defendant might be armed with a knife and that he would not be taken easily. The search and seizure of the checkbook which Detective Sonensen feared might be a knife upon the initial pat-down was proper as incident to a lawful arrest. That checkbook is admissible upon the trial.

The items seized from the defendant's room were obtained pursuant to a consentual search. After having been advised of the contents of the consent form (People's #3 in evidence), the defendant signed the form authorizing the search. The items seized pursuant to this consentual search are likewise admissible upon the trial.

In view of the foregoing, the defendant's motion is in all respects denied.

POINT I

SINCE THE INFORMER'S STATEMENT WAS CORROBORATED BY INDEPENDENT POLICE INFORMATION AND OBSERVATION, THE POLICE HAD PROBABLE CAUSE TO ARREST PETITIONER; ACCORDINGLY, THE EVIDENCE SEIZED DURING A SEARCH INCIDENT TO ARREST AND THE CONFESSION WERE LEGALLY OBTAINED AND INTRODUCED AT TRIAL.

Petitioner asserts that there was no probable cause for his arrest and therefore that the items seized from him during a search pursuant to the arrest* and his confession should have been suppressed. Petitioner suggests that his arrest was based on no more than unverified information supplied by an unreliable informer. This claim is squarely controverted by the uncontested facts of this case.

An arrest without a warrant can be made only if there is probable cause to believe that the person arrested has committed a crime. E.g. Brinegar v. United States, 338 U.S. 160 (1949). Probable cause can only be measured within the facts

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* The search incident to arrest produced the checkbook of the victim, Mrs. Abrams.

and circumstances of the particular case. Draper v. United States, 358 U.S. 307 (1959); Bailey v. United States, 389 F. 2d 305, 308-309 (D.C. Cir. 1967). The police must have enough information "to warrant a man of reasonable caution in the belief" that a crime has been committed and that the person arrested has committed it. Caroll v. United States, 267 U.S. 132, 162 (1925).

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, supra, at 175.

Prior to petitioner's arrest the police had received information from one James Woods, petitioner's neighbor in his apartment building, which incriminated petitioner. Woods told the police that petitioner came to his apartment with checks and credit cards bearing the surname Abrams and asked Woods if he "could do anything with them." Woods stated that he had tried unsuccessfully to pass the checks and had then returned the items to petitioner. He described petitioner as a medium skinned Negro about six feet tall, neatly dressed,

wearing green patent leather shoes, a wide collar shirt and a leather jacket. Woods stated that petitioner could be found at a laundromat opposite the Great Neck station of the Long Island Railroad.

The information which Woods gave to the police was substantially corroborated by the information already within the knowledge of the police at the time of the arrest. The name Abrams was, of course, the name of the victim of the crime, who had reported that a checkbook and credit cards were in the handbag taken from her. The description of petitioner which Woods gave to the police substantially matched the description Mrs. Abrams gave of her attacker.* Petitioner was in fact found and arrested at the location which Woods specified (see Draper v. United States, supra, at 312-13). Prior to the actual arrest, the police had ample time to observe that petitioner met the description given to them.

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* On the evening of the crime Mrs. Abrams twice described her assailant as a male Negro, about 6' 1" or 6' 2", short hair, clean shaven, and light-complexioned. On the following morning she repeated the description, adding that he worn a 3/4 length jacket and had long sideburns.

It is by now well established that information provided by an informer can be used by the police to establish probable cause even though the informer has not established his reliability by providing the police with reliable information on previous occasions. When the police possess information which corroborates the informer's tip, a finding of probable cause is justified even though the tip alone could not have sustained such a finding. Whitely v. Warden, 401 U.S. 560, 567 (1971); United States v. Sultan, 463 F. 2d 1066, 1068-69 (2d Cir. 1972); United States v. Manning, 448 F. 2d 992, 995 (2d Cir.), cert. den. 404 U.S. 995 (1971); United States v. Viggiano, 433 F. 2d 716, 718-19 (2d Cir. 1970), cert. den. 401 U.S. 938 (1971); United States v. Romero, 343 F. Supp. 988, 99 (S.D.N.Y. 1972). See United States v. Harris, 403 U.S. 573, 579 (1971).

In the instant case there was sufficient independent information and observation prior to petitioner's arrest to convince the police that Woods' statement was more than some "meager report" that "could easily have been obtained from an offhand remark heard at a neighborhood bar." Spinelli v. United States, 393 U.S. 410, 417 (1969). Rather this was

information "which in common experience may be recognized as having been obtained in a reliable way." Id. at 417-18. When an informer's information is specific and verifiable in part, the existence of a record of previously reliable information from him is not required.* United States v. Sultan, supra, at 1068-69; United States v. Manning, supra, at 995. United States v. Romero, supra, at 718. Personal and recent observations of criminal activity are factors which demonstrate that the information has been gained in a reliable way. United States v. Harris, supra, at 579. The indications of reliability in the case at bar are certainly as "impressive in establishing the informer's reliability as an agent's perfunctory and usually untested recital that on one or two previous occasions the informer had furnished facts leading to a conviction." United States v. Manning, supra, at 1000.

The rationale for this test of independent or corrobative evidence is obvious since there must be a means of assessing the reliability of an informer such as Woods who, while having specific personal knowledge of the crime, has

* The corroborating evidence, even though not adequate of itself to establish probable cause, constitutes a sufficient safeguard against fabrication by the informer. United States v. Comissiong, 429 F. 2d 834, 839 (2d Cir. 1970).

not served as a police informant before and thus has not established his reliability in the conventional manner. This Court has recognized the inherent need for this test in dealing with a class of informants who by their very nature are unlikely to have a record of previous reliability, namely, the victims of crimes. United States ex rel. Cardaio v. Casscles, 446 F. 2d 632, 637 (2d Cir. 1971). To require evidence of previous reliability from such individuals would create "a standard impossible fo attainment" since they are likely to be strangers to the arresting officers. Id. The distinguishing feature of their information is that it is firsthand and based on personal knowledge. Id. at 636. The same measure of reliability must attach to the assessment of information received from those whose knowledge of the commission of a crime is similarly firsthand and personal, although they are not victims, and in some cases received the information after the fact. Moreover, information from informants has been held sufficient by virtue of their status or relationship to the crime or the defendant. United States v.

Sultan, supra, at 1069 and cases cited therein.*

Finally, the reliability of incriminating information from one who is himself involved in criminal activity relating to the original crime is further established by a showing that his statement to the police was against his penal interest. The declaration against interest is contrary to the self interest of the speaker and tends to indicate its accuracy. See 5 Wigmore, Evidence § 1457 (1974 ed.). Woods admitted to the police that he had received checks from the petitioner with the victim's surname on them and had unsuccessfully attempted to cash them. This admission of course exposed Woods to criminal prosecution.

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* Petitioner's reliance on Gatlin v. United States, 326 F. 2d 666 (D.C. Cir. 1963), (Petitioner's Brief at 15) is misplaced. In Gatlin the challenged arrest was "based solely" on information obtained from an accomplice of untested reliability. Id. at 671. There was no specific identification by the victim of the crime nor was there corroboration of the information given by the informer. In the instant case the police had Mrs. Abrams' identification as well as other corroboration of the informer's statement.

The Supreme Court has said of such statements:

> "Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements [against penal interest]. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility - sufficient at least to support a finding of probable cause to search." United States v. Harris, supra, at 583.*

See also United States v. Viggiano, supra, at 718, n. 3 (declaration by one who had agreed to aid and abet in disposing of stolen goods). Cf. Chambers v. Mississippi, 410 U.S. 297 (1973).

As a further deterrent to fabrication, Woods was liable to criminal prosecution under N.Y. Penal Law § 240.50(3) if he reported the occurrence of an offense or incident which

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* The New York Court of Appeals has also recognized the declaration against penal interest as a factor demonstrating reliability. People v. Wheatman, 29 N Y 2d 337 (1971).

did not in fact occur. See People v. Moore, 32 N Y 2d 67, 71 (1973).

Probable cause need not lie in an isolated aspect of the information available to the police but may be established by the totality of circumstances. Woods' information, the information provided by the victim, and independent observation by the arresting officers was more than sufficient to establish probable cause for petitioner's arrest. Indeed, the police would have been "derelict in their duties" had they failed to pursue the available information. See Draper v. United States, supra, at 313; United States v. Manning, supra, at 999.

POINT II

THE ADMISSION AT TRIAL OF EVIDENCE OF PETITIONER'S PRIOR CONVICTION WAS HARMLESS ERROR AND DID NOT DEPRIVE HIM OF A FUNDAMENTALLY FAIR TRIAL.

As recounted above (ante, at 4-5), evidence of petitioner's prior conviction was admitted at trial when a portion of the 85a form was read to the jury. Even though petitioner had himself introduced the form into evidence and had failed to request redaction of that portion, technical legal error was committed. People v. Condon, 26 N Y 2d 139, 143 (1970); People v. McLean, supra. However, errors committed in the conduct of state criminal trials will not be reviewed by the federal courts, absent a showing that the wrong complained of deprived the defendant of a fundamentally fair trial. Buchalter v. New York, 319 U.S. 427 (1943); United States ex rel. Castillo v. Fay, 350 F. 2d 400, 403 (2d Cir. 1965), cert. den. 382 U.S. 1019 (1966); United States ex rel. Bryant v. Vincent, 373 F. Supp. 1180, 1183-84 (S.D.N.Y. 1974); United States ex rel. Conomos v. Fay, 363 F. Supp. 994, 1002 (S.D.N.Y. 1973). The rule applies to evidence or

questioning at trial which concerns prior crimes or convictions. E.g. Times v. Wainwright, 482 F. 2d 935 (5th Cir. 1975); Matha v. Swenson, 449 F. 2d 175 (8th Cir. 1971); Grant v. Kropp, 407 F. 2d 776 (6th Cir.), cert. den. 395 U.S. 916 (1969); United States ex rel. Green v. McMann, 268 F. Supp. 529, 531 (S.D.N.Y. 1967).

In light of the overwhelming evidence against petitioner (the victim's positive identification, the stolen items, and the confession), it is certain that any error in the admission of the prior conviction was harmless and that the jury would have reached the same verdict in any event, as both the Appellate Division (People v. McLean, supra) and the District Court held. See United States ex rel. Conomos v. LaVallee, supra, at 1002. As the Supreme Court stated in Milton v. Wainwright, 407 U.S. 371, 377 (1972), "we do not shut our eyes to the reality of overwhelming evidence of guilt fairly established in the state court."

Furthermore, the Supreme Court has specifically held that the introduction of evidence of a previous conviction is not inherently violative of due process when the jury has been instructed that the evidence may not be used to determine the

defendant's guilt on the charge at hand. Spencer v. Texas, 385 U.S. 554, 563-64 (1967). In the instant case the jury was explicitly and extensively so instructed (ante, at 5). The law presumes that the jury will heed instructions of the court. Id. at 562.

Since it is clear beyond a reasonable doubt that the jury could have reached no other verdict than that rendered, even if they had not learned of the prior conviction, the admission of the evidence was harmless error and constituted no violation of petitioner's federally protected rights.

CONCLUSION

THE ORDER OF THE DISTRICT COURT DENYING PETITIONER'S HABEAS CORPUS APPLICATION SHOULD BE AFFIRMED.

Dated: New York, New York
April 7, 1975

Respectfully submitted,

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Appellee

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EXHIBIT "A"

Q When you came back to the squad from picking up the defendant by the laundromat was Woods present?

MR. BRANDT: If your Honor please, I would object to the form of the question.

THE COURT: Overruled.

A Yes.

Q Now, I refer you to Defendant's Exhibit F, the 85A, isn't that correct?

A Yes.

Q Now, under remarks, would you look at that?

A Yes.

Q Would you read that, please?

A "Prior arrest record admitted by Def. for robbery, assault."

MR. BRANDT: Objection, your Honor.

MR. PECK: It is the Defendant's exhibit.

THE COURT: We will take a recess, ladies and gentlemen. During this recess you will continue under my admonition not to form or express any opinions about this case and you will not discuss it either amongst yourselves or with anyone else under any circumstances.

Detective, you are still under oath. Do not discuss your testimony with any other person who expects to be called as a witness during this trial. Step down. Ladies and gentlemen, you are excused.

(Whereupon the jurors were excused from the courtroom.)

THE COURT: Close the doors and read back to me the last question and as much of the answer as you managed to get before the objection was imposed.

(Whereupon the last question and answer was read back by the court reporter.)

THE COURT: That is where the objection was imposed?

COURT REPORTER: Yes.

THE COURT: All right, gentlemen, excuse me for a few moments.

RECESS

THE COURT: All right. Now, I interrupted you in the middle of your objection, Mr. Brandt. Did you wish to be heard further?

MR. BRANDT: No, your Honor.

THE COURT: You have nothing else to say?

MR. BRANDT: No, your Honor.

THE COURT: Very well. Recall the jury and the witness may complete his answer.

MR. BRANDT: May I ask your Honor - -

THE COURT: Hold it just a moment.

MR. BRANDT: May I ask your Honor to instruct the jury that they are to disregard the answer of the witness?

THE COURT: You wish to be heard?

MR. PECK: Yes. I have a recollection yesterday of coming to the bench on a question that Mr. Brandt asked and I informed you and Mr. Brandt that you may not like the answer to this question.

THE COURT: Yes, I recall it very well.

MR. BRANDT: And to be quite candidly with you - -

THE COURT: Candid.

MR. PECK: Candid, Judge, in the preparation of this case I warned Detective Sonesen not to mention anything about a possible record unless specifically asked by either the Court or the defense attorney. I thought I put you on notice in that regard. This exhibit that is already in evidence was an exhibit during a lengthy pre-trial hearing.

THE COURT: It was marked so in the hearing before me on March 20th of 1973 and defendant's counsel read it through at that time and read it during this trial. It was originally marked during this trial, People's Exhibit 17 for identification, when it was called for at defense counsel's request and later marked Defendant's F in evidence and is now Defendant's F in evidence.

MR. PECK: That's right.

MR. BRANDT: Your Honor will recall that I read only small portions of this exhibit and not the form. I never referred to anything which related to the charge of prior

crimes. The question was asked directly by Mr. Peck and not by me. It is a fact that it is my exhibit but it was not read to the jury.

THE COURT: Well, the only reason you read part of it before is because you felt what you read was helpful to your cross examination of Sonesen. That is neither here nor there with respect to what we are discussing now. The defendant has put this entire document in evidence. The jury can read every word of it. Either counsel have a right to read every word of it to the jury. The witness may respond to the question of what is in it just as the witness was permitted to do it when you were showing him exhibits during your cross examination.

MR. BRANDT: In view of your Honor's comments I would move for a mistrial at this time.

THE COURT: Your motion is in all respects denied.

MR. BRANDT: I would ask your Honor if your Honor would direct the jury then that they may not consider the prior record with respect to evidence.

THE COURT: That request is likewise denied.

MR. BRANDT: I would ask your Honor to redact that portion of the exhibit which refers to the prior record.

THE COURT: That request is likewise denied.

MR. BRANDT: Exception, your Honor.

THE COURT: All right, bring the jury back.

(Whereupon the jurors were returned to the courtroom.)

THE COURT: All right, come up here for a moment.

(Whereupon the following took place at the bench.)

THE COURT: Come closer, gentlemen. Mr. Peck, as you proceed with your next question I do caution you not to go beyond the wording of what is in the exhibit with respect to your last question. You understand that? I want no amplification or even an endeavor to amplify the exact words of the exhibit and I want to remind you both that when this paper, now Defendant's F in evidence during this trial was originally marked by the Court as an exhibit during the omnibus hearing, prior to this trial, counsel as well as the Court went over this with great care and at the request of the People a portion of it was redacted and still is redacted. That no other request was ever made to the Court for the redaction of anything other than what was redacted during the hearing, and even at the time when it was offered during this trial the redaction that was made during the hearing prior was referred to by the Court. Now, Mr. Peck, the exact words in the exhibit, nothing more, nothing less.

MR. PECK: Yes, sir.

THE COURT: Very well.

(Whereupon the following took place in open court.)

THE COURT: All right, wait just a moment, Mr. Peck, I will be right with you. I have another matter waiting for my attention. I am trying to collate our time clock with respect to lunch, the other matter awaiting my attention and then we are going to reconvene this afternoon. Bear with me for just a moment while I check these few things out.

(Whereupon there was an off the record discussion, not within the hearing of the court reporter.)

THE COURT: All right, we may go on. Mr. Peck, you may put your next question.

Q Detective, referring you to Defendant's Exhibit F entitled "Remarks."

MR. PECK: If I may, Judge, May I read this part to the jury?

THE COURT: You may, it is in evidence.

MR. PECK: Yes.

THE COURT: The entire document is in evidence, except for a portion that is redacted.

MR. BRANDT: Except for the portion redacted?

THE COURT: Yes, of course.

MR. PECK: "Remarks: Prior record, outside Nassau County, character, reputation, associates, special knowledge regarding this case. Prior arrest admitted by Def. for robbery and assault, 1968, spent four years in Green Haven, Stormville,

New York."

THE COURT: Now, Mr. Foreman and Madam of the jury. As you have just heard from the District Attorney this Defendant's Exhibit F in evidence refers to a prior arrest of the defendant. I charge you that a prior arrest is no proof - - I should say I instruct you rather than charge you, I instruct you that a prior arrest is no proof that the defendant is guilty of the crime for which he is being tried. Is that clear to everyone? Next question.

MR. PECK: May I see the exhibit.

Q Now, Detective, if you were instructed or ordered to work on a non-scheduled tour is it not a fact that - -

MR. BRANDT: Objection, your Honor.

THE COURT: As to the form of the question, sustained.

Q At any time does a policeman or a detective get overtime?

A Yes.

Q Now, what is that overtime based on, time and a half, double time, whatever it may be?

MR. BRANDT: Objection, I think it might be irrelevant.

THE COURT: Sustained.

Q When does a detective get overtime?

MR. BRANDT: Objection, your Honor.

THE COURT: Sustained.

Q Meinenger was not working the tour of duty that you were

THE WITNESS: Yes, your Honor.

THE COURT: We stand in recess as indicated.

THE CLERK: Remain seated, please.

(Whereupon the Court took the luncheon recess.)

THE COURT: The defendant is present. You wish to make an application?

MR. BRANDT: Yes.

THE COURT: Go ahead. Then I will hear from you, Mr. Peck.

MR. BRANDT: If your Honor please, the Form 85A, which is headed up a crime report, which is Defendant's Exhibit - -

THE COURT: I have it here, Defendant's F in evidence.

MR. BRANDT: - - Defendant's F in evidence bears a legend at the bottom which indicates that the defendant had been arrested for robbery and assault in 1968 and that he spent four years in Green Haven, Stormville, New York. I would ask your Honor to redact that information of the exhibit nunc pro tunc.

THE COURT: Mr. Peck.

MR. PECK: I am afraid that I must object. It is already before the jury. It was not introduced by me, we went over this in this pre-trial and, Judge, I warned - -

THE COURT: Go ahead.

MR. PECK: - - I warned defense counsel this might come

when I didn't say that the People had asked that something be redacted from that. I merely pointed out to them that something had been previously been redacted from it. I don't think there is any need for me to be that specific. That request on your part will be denied.

MR. PECK: May I further argue the motion of the defendant with regard to Form 85A at this point?

THE COURT: Yes, Defendant's F.

MR. PECK: As I understand this, the law, Judge, if a question of this sort, without an answer, is put before a jury, in other words was the defendant convicted of a crime on such and such a date, and there is no answer, was the defendant arrested on such and such a date, and there is no answer, the question in and of itself is the basis for a mistrial, that is the law as I understand it.

Now, with regard to this particular exhibit, Defendant's Exhibit 85A, this matter is already before the jury, part of it is before the jury in sworn testimony of the police officer, I believe the first sentence. Everything is before the jury.

THE COURT: Yes.

MR. PECK: On my reading of the exhibit, and I guess we can argue that once an exhibit is in evidence and I read that exhibit to the jury, that is the same as sworn testimony.

To me it makes no sense, if there is harm it is done, to redact it at this point - -

THE COURT: You may be absolutely right when you say, Mr. Peck, if there is harm it has been done. I cannot rationally quarrel with that premise, what I can do at this belated moment is exert every effort I can to insure that no further harm will be done and to try as best I can, imperfect though the method may be, to repair whatever damage has already been done and I can appreciate not only your feelings concerning the logic of your reasoning but also I certainly can understand your thoughts with respect to what the Court is about to do with reference to the 85A form, Defendant's F.

MR. PECK: If that portion is redacted now, your Honor, I would think that the jury may draw an unfavorable inference with regard to the People in this case when I believe no unfavorable inference should be drawn.

THE COURT: No unfavorable inference should be drawn and I hope to prevent such an inference from arising in the jury's mind by virtue of a remark or two I intend to make to them about it when they come back into the jury box, and I want you to know, I have not enunciated as yet, but you have very understandably and perceptively decided what my ruling was going to be. As I said to Mr. Brandt half

facetiously, nunc pro tunc, I am going to grant his application to redact the line which you ~~very properly~~ read to the jury this morning from the exhibit, Defendant's F in evidence, when I permitted you to, but in order to prevent any further harm coming from that and perhaps to minimize the harm that is already done, if not to eradicate it, I am granting his application to redact, I think it is the last two lines at the bottom of the front page of Defendant's F in evidence, and I intend to say very briefly to the jury about it, which I trust will prevent them from reacting unfavorably to the defendant as well as unfavorably to the People, and these are my rulings with respect to the defendant's request for the redactions and I will say no more about it at this time except to say that each side of course, the People in this instance, have an exception to each of my rulings, and the defendant needs none.

Now, I think we will recall the jury. We have the new copy of the Defendant's C, gentlemen. Show it to counsel.

Mr. Brandt, I am just handing up to both of you to look at the new photocopy of Defendant's C in evidence with the redactions which the Court - -

MR. BRANDT: Judge, the words: "arrest, robbery," still appear.

MR. PECK: This is this charge.

THE COURT: I thought that you had.

MR. BRANDT: I saw 85A.

THE COURT: Satisfactory, Mr. Brandt?

MR. BRANDT: Yes, your Honor.

THE COURT: Very well, mark that approved by both sides, the photocopy of Defendant's C in evidence. It has the marking. This will be in evidence in place and instead of the original by consent of both sides. You can give this back to Mr. Brandt. This is ours.

THE CLERK: That's right.

MR. PECK: Will you instruct the jury it has been photocopied, your Honor?

THE COURT: Yes, I will. If I forget you remind me. Let me have the jury in now.

(Whereupon the jurors were returned to the courtroom.)

THE COURT: Mrs. Vitali, Mr. Foreman and gentlemen. Before we resume the redirect examination of Detective Sonesen there were two matters that I wish to call to your attention which have taken place outside of your presence.

Number one, I want to advise you that the portion of the Police Department, the NC Form 85A, Defendant's F in evidence, which I permitted Mr. Peck to read a small portion of to you this morning, from the bottom of it dealing with something having to do with the defendant's past, has now been re-

dacted from that exhibit, namely as I hand it up to you, where you see this strip of pink paper. The reference that I permitted Mr. Peck to read at that time has been striken from the exhibit.

Now, I want you to know in fairness that Mr. Peck in my view was perfectly proper in reading what he did to you this morning and I permitted him to read it because I felt then and feel now that it was proper for him to have been permitted to read it to you at that time because the entire document, Defendant's F, and everything in it was in evidence but I have had a discussion with counsel for both sides about it after lunch and I have ruled that what Mr. Peck did read to you will be striken and has been striken from it and I remind you now of something that I said to you shortly after that small portion of it was read to you by Mr. Peck. I say to you once again, I instruct you that a previous arrest of a crime is no proof that the defendant is guilty of the crime for which he is being tried here, and I ask you now, and do more than ask, I direct you to strike from your minds for any and all purposes any reference to what was read to you this morning as I permitted Mr. Peck to do and it is no longer to be considered as a part of the evidence during this trial by you in any shape, manner or form, and I want you to know that nothing that the People, that

Mr. Peck did at that time was in the slightest possible degree improper, not in any shape, manner or form. He had every right to read to you when he did as I permitted him to because as I repeat, the whole document was in evidence, but we have come past that now, it has been striken and I direct you once again to disregard the reference made to it in its entirety and bear in mind my admonition to you, which I repeat once again, that any reference to a previous arrest is no proof that the defendant is guilty of the crime for which he is being charged and you will disregard that reference in its entirety in every way. Is that clear to everyone?

JURORS: Yes.

THE COURT: Do you all agree to abide by that instruction?

JURORS: Yes.

THE COURT: Very well. Now, next I want to advise you that there is another exhibit, namely Defendant's C in evidence, the Form 81, the Nassau County Police Department arrest record, and two lines have been striken from that form at my direction and you will - - yes, I have directed that a photocopy of Defendant's C in evidence be substituted for the original and both counsel have agreed to that substitution and there again, I don't want you to assume in any possible way that anything that was striken from either

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Rosalba Federici, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 7th day of April, 1975, she served the annexed upon the following named person:

EUGENE MURPHY
Attorney for Petitioner-Appellant
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, N.Y.

Attorney in the within entitled Proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Rosalba Federici

Sworn to before me this
7th day of April, 1975

Margery Evans Reifler
Assistant Attorney General
of the State of New York